STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 2000B017

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

LEE J. GONZALES,

Complainant,

vs.

DEPARTMENT OF HUMAN SERVICES,
COLORADO STATE VETERANS CENTER,

Respondent.

Hearing was held on September 27, 1999 before Administrative Law Judge Robert W. Thompson, Jr. Respondent was represented by Assistant Attorney General Susan J. Trout. Complainant appeared and was represented by Nancy M. Britt, Attorney at Law.

Respondent's sole witness was Stephen Kralik, Administrator of the Colorado State Veterans Center, Homelake, Colorado. Complainant testified on his own behalf and called no other witnesses.

A witness sequestration order was entered excepting complainant and respondent's advisory witness, Stephen Kralik.

Respondent's Exhibits 1 and 5 through 17 were stipulated into evidence. Exhibits 2, 3 and 4 were admitted over objection. Exhibit 18 was excluded. Complainant's Exhibits A through D, F, G and H were admitted by stipulation. Exhibit E was withdrawn.

MATTER APPEALED

Complainant appeals a three-month disciplinary pay reduction and a concurrent corrective action. For the reasons set forth below, respondent's actions are rescinded.

1. Whether respondent's actions were arbitrary, capricious or contrary to rule or law;

2. Whether the discipline imposed was within the range of available alternatives;

3. Whether the complainant failed to mitigate damages.

FINDINGS OF FACT

1. Complainant Lee J. Gonzales has been employed by respondent Colorado State Veterans Center for the past three years as a Food Service Worker. He has a total of seven years of state service in this capacity.

2. The Colorado State Veterans Center, located in Homelake, Colorado, consists of a 60-bed nursing home and a 46-bed assisted living facility. The Center is a 24-hour, seven days per week operation.

3. As a Food Service Worker, complainant has a variety of duties, inclusive of dishwashing, food preparation and serving, and cleaning up in the kitchen. His days off are Thursday and Friday.

4. On Thursday, July 1, 1999, his day off, complainant kept an appointment with his personal medical provider, a certified nurse practitioner (NP), because of pain and numbness in both hands, a condition he had been experiencing for a couple of weeks. He was inspired to make the appointment because a few days earlier he had dropped a piece of cake on a resident, which he attributed to the fact that his hands "gave way."

5. The NP diagnosed complainant's condition as carpal tunnel syndrome of both hands. Indicating that complainant's work environment caused stress in his hands, the NP instructed him to take off work for the next week. (Exh. B.)

6. This was the first time complainant considered the pain in his hands to be work-related. He had told two co-workers of the pain and numbness, but he did not attribute the cause to his job. He was able to get by because the pain was not constant; it always went away.

7. That evening, July 1, complainant telephoned his supervisor, Dorothy Chambers, to say that he could not perform his duties, that his doctor had told him to take time off from work to rest his hands due to carpal tunnel syndrome. Chambers advised him that the Center was short-staffed, and he would have to bring in a doctor's statement and file a worker's compensation claim.

8. Complainant reported in the morning on Friday, as directed by Chambers. He had a medical statement with him. Chambers advised him that he could use sick leave in order to take the time off that he needed, but if he did, he "would not be able to claim worker's compensation at a later time." If he wished to file a worker's compensation claim, he had to be seen by a worker's

compensation provider rather than his personal provider. (Exh. 2.)[1] Complainant interpreted this as a denial of his request for sick leave. He had sick leave available.

9. Taking sick leave does not prevent an injured worker from filing for worker's compensation, although the worker may be denied worker's compensation benefits for the time off unless the time was authorized by a designated provider.

10. The agency's sick leave policy is that the employee must notify his supervisor if he is unable to work.

11. Complainant filled out an incident report documenting his injury as well as an "Injury/Exposure On The Job Form." (Exh. A, Exh. C.)

12. The agency made an appointment for complainant to see the designated provider, Eric Marty, Physician's Assistant (PA), for 3:00 p.m. By that time complainant had gone back home for the rest of his day off, where he was contacted by the accounting technician, who handled worker's compensation claims for the Veterans Center, and advised that he should return to the Center by 2:30 and bring with him the completed packet of worker's compensation forms. He complied.

13. Complainant kept the appointment with the PA, who recommended that complainant return to work on Saturday, July 3, on modified duty, that is, without repetitive motion, and that he wear

[1] Exhibit 2, a documenting memo, inadvertently refers to July 11. The correct date is July 1.

wrist braces. (Exh. 7.)

14. Complainant was frustrated that he would not be allowed to take off work due to his injury, and he apparently blamed his supervisor, Chambers. Following his appointment with the PA, complainant went back to the Center and submitted his written resignation, effective July 2, as follows: "I Lee Gonzales resign as of 7-2-99 due to harassment from my supervisor Dorothy Chambers." (Exh. 8.)

15. Having resigned, complainant did not show up for work on July 3, 4, 5 and 6. His absence put a hardship on the agency, but all required services were provided to the residents.

16. July 4, 1999 fell on a Sunday. The legal holiday was July 5.

17. Complainant was again seen by the agency's health care provider, PA Marty, on July 6. Marty recommended that complainant remain off work at least until July 13. (Exh. F.)

18. Sometime on Wednesday, July 7, complainant submitted a written withdrawal of his resignation, as follows: "I Lee Gonzales would like to withdraw my resignation as of 7-7-99." (Exh. 9.)

19. Stephen Kralik, the Center's Administrator and the appointing authority, did not see complainant on Wednesday, but he was informed of complainant's resignation withdrawal by Chambers. Kralik was not sure what the personnel rules allowed with respect to the time frame for withdrawing a resignation, so he gave

complainant the benefit of the doubt and accepted the withdrawal.[2]

20. Kralik told complainant that withdrawing the resignation meant that it never occurred and, therefore, complainant was not authorized to take off the four days he was absent.

21. Complainant did not earn any outside income during the four days he was off work.

[2] Board Rule R-7-6, 4 CCR 801, provides that an employee may withdraw a resignation within two business days after giving notice, and the appointing authority may otherwise approve the withdrawal request at any time.

22. On July 12, Kralik served written notice on complainant scheduling an R-6-10 meeting for July 13 to discuss three issues: 1) "Not following the agency's policy regarding reporting an injury on duty and failure to complete the appropriate documentation; 2) failure to report for work for five consecutive days;[3] 3) possible insubordination." (Exh. 10.)

23. The R-6-10 meeting was held as scheduled. Kralik concluded that complainant "willfully violated agency rules" by being absent without approval on July 3, 4, 5 and 6 and by failing to report a possible worker's compensation claim to his supervisor. (Exh. 1.) As to the failure to report an injury, Kralik wrote in the July 19 disciplinary letter:

> I also find that you told at least two employees in the Dietary Department of your wrist pain within the two weeks preceding your visit to your physician. There have also been numerous inservices on the need to report Workers Comp cases or possible Workers Comp cases to you (sic) supervisor....You knew or should have known that this could be a possible Workers Comp claim. (Exh. 1.)

24. The issue of "possible insubordination" was not addressed by the appointing authority and was not a basis for the disciplinary or corrective action.

25. Kralik considered the failure of an employee to immediately report a worker's compensation injury to be serious because the employee might not receive benefits and because the employer faces a statutory penalty for not filing the first report of injury.

---

[3] The agency concedes that complainant failed to report on four, not five, consecutive days.

26. On July 19, 1999, the appointing authority imposed both a corrective action and a disciplinary action. The corrective action, in effect for six months, called for complainant to comply with the agency's policies and procedures for reporting on-duty injuries or possible worker's compensation claims, and to obtain approval in advance for time off. The disciplinary action imposed a one-step pay reduction for three months. (Exh. 1.)

27. Complainant returned to work with restrictions on July 21. (Exh. H.)

28. The agency's policy is that work-related injuries be reported immediately. (Exh. 5.) Complainant was disciplined for violating this policy, not state law relative to the reporting of worker's compensation claims.

29. Complainant was charged four days of leave without pay (LWOP) for missing work on July 3, 4, 5 and 6.

30. As of September 24, 1999, the Colorado Insurance Compensation Authority had not admitted liability, and complainant's claim for worker's compensation had not yet been granted.

31. Complainant Lee J. Gonzales filed a timely appeal of the disciplinary action and the concurrent corrective action on July 30, 1999.

DISCUSSION

In this *de novo* disciplinary proceeding, the burden is on the

agency to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warranted the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). It is the role of the administrative law judge, not the reviewing court, to resolve the conflicts in the evidence and to determine witness' credibility and the weight to be given their testimony. *Charnes v. Lobato*, 743 P.2d 27 (Colo. 1987).

The disciplinary action and the concurrent corrective action cannot stand.

I.

There is insufficient evidence that complainant willfully failed to report a possible worker's compensation claim. He did not perceive his sore wrists and hands as an on-the-job injury until his personal service provider suggested that his work environment caused stress in his hands and, because of that, he should take off work for the next week. While he understandably mentioned to co-workers that his hands hurt, he did not express a belief that the injury was work-related. And while the appointing authority testified that the agency had sponsored in-services on the filing of worker's compensation claims, there was no testimony of when or if complainant attended those in-services. No direct link between complainant and the information was ever established, even though there was testimony that employees receive a packet containing the agency's policy, Exhibit 5.

There is insufficient evidence that complainant knew that he sustained a work-related injury which had to be reported as a worker's compensation claim, or that he intentionally did not

report it. He had no motive to not report a worker's compensation injury. He was not trying to hide something. He wished to receive worker's compensation, and as soon as he was told to fill out certain forms, he did so. He did everything that was asked of him. Apparently, the Colorado Compensation Insurance Authority did not see it as a clear-cut case of a job-related injury, either, since it questioned the claim and had not approved it as of September 24. A willful act must be knowing and intentional:

> A willful act may be described as one done intentionally, knowingly, and purposely, without justifiable excuse, as distinguished from an act done carelessly, thoughtlessly, heedlessly, or inadvertently. A willful act differs essentially from a negligent act. The one is positive and the other negative.

Black's Law Dictionary at 1599 (6th Ed.).

Neither the disciplinary action nor that part of the corrective action having to do with reporting a worker's compensation injury were justified for lack of willfullness and because complainant cooperated with the agency in reporting the claim once the injury was identified as possibly work-related. He did nothing wrong in this regard.

Although the appointing authority testified that the agency faces a statutory penalty for not filing a first report of injury, he did not explain why he believed that an employer would be penalized for not reporting an injury that was unknown to the employer. The appointing authority emphasized that the reporting policy included the reporting of cumulative injuries, yet, by definition, it is difficult to pinpoint the beginning of a cumulative injury because the symptoms need to accumulate over a period of time before they are identifiable. It is unreasonable to

expect an employee who develops sore wrists to immediately recognize that he suffers from carpal tunnel syndrome, and the cause of his condition is related to his job duties.

In addition to the above, the appointing authority violated R-6-2, 4 CCR 801, by proceeding immediately to disciplinary action before subjecting the employee to corrective action. A concurrent corrective action does not satisfy this rule. Complainant's conduct cannot be considered "so flagrant or serious" as to justify immediate disciplinary action. Even if he had willfully failed to report a worker's compensation injury, no harm was done to himself or to the agency. The reason that his claim has not been approved is not that the report was untimely.

II.

It was an abuse of agency discretion for the appointing authority to arbitrarily treat the resignation as if it did not occur. The reality is that complainant resigned his job and then withdrew his resignation. It makes a difference procedurally and substantively. Procedurally, complainant should not have been placed on leave without pay for July 3, 4, 5 and 6 because he was not an employee of the agency on those dates. The reason he did not deserve to get paid was that he resigned his position effective immediately, not that he was absent without approved leave.

Substantively, complainant could not be disciplined or corrected for missing work without authorization when, upon his resignation, he had no obligation to be on the job he had quit. Thus, he was disciplined for an act he did not commit. He could not be away from his job without authorization when he had no job to be away from. The appointing authority's assertion that withdrawing the resignation meant that it did not occur was an

impermissible attempt to rewrite history.

Perhaps complainant could have been disciplined or corrected for resigning without giving notice.[4] Nevertheless, the agency did not approach the matter in that way. Complainant was not advised of possible discipline on the basis of a failure to give proper notice of his resignation. Indeed, the appointing authority could not have taken this approach because, as far as he was concerned, the resignation never took place.

Neither party is entitled to an award of attorney fees and costs. *See* R-8-38, 4 CCR 801.

CONCLUSIONS OF LAW

1. Respondent's actions were arbitrary, capricious or contrary to rule or law.

2. The discipline imposed was not within the range of available alternatives.

3. Complainant did not fail to mitigate damages.

ORDER

The disciplinary action of a three-month pay reduction is rescinded. The corrective action is rescinded. Complainant shall be reimbursed for any lost wages and benefits as a result of the

[4] Board Rule R-7-5, 4 CCR 801, requires an employee to give written notice of resignation ten working days prior to the effective date.

disciplinary pay reduction.

DATED this _____ day of November, 1999, at Denver, Colorado.

_____
Robert W. Thompson, Jr.
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

EACH PARTY HAS THE FOLLOWING RIGHTS

1. To abide by the decision of the Administrative Law Judge ("ALJ").

2. To appeal the decision of the ALJ to the State Personnel Board ("Board"). To appeal the decision of the ALJ, a party must file a designation of record with the Board within twenty (20) calendar days of the date the decision of the ALJ is mailed to the parties. Section 24-4-105(15), C.R.S. Additionally, a written notice of appeal must be filed with the State Personnel Board within thirty (30) calendar days after the decision of the ALJ is mailed to the parties. The notice of appeal must be received by the Board no later than the thirty (30) calendar day deadline. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990); Sections 24-4-105(14) and (15), C.R.S.; Rule R-8-58, 4 Code of Colo. Reg. 801. If a written notice of appeal is not received by the Board within thirty calendar days of the mailing date of the decision of the ALJ, then the decision of the ALJ

automatically becomes final. Vendetti v. University of Southern Colorado, 793 P.2d 657 (Colo. App. 1990).

PETITION FOR RECONSIDERATION

A petition for reconsideration of the decision of the ALJ may be filed within 5 calendar days after receipt of the decision of the ALJ. The petition for reconsideration must allege an oversight or misapprehension by the ALJ. The filing of a petition for reconsideration does not extend the thirty calendar day deadline, described above, for filing a notice of appeal of the decision of the ALJ.

RECORD ON APPEAL

The party appealing the decision of the ALJ must pay the cost to prepare the record on appeal. The fee to prepare the record on appeal is **$50.00** (exclusive of any transcription cost). Payment of the preparation fee may be made either by check or, in the case of a governmental entity, documentary proof that actual payment already has been made to the Board through COFRS.

Any party wishing to have a transcript made part of the record is responsible for having the transcript prepared. To be certified as part of the record, an original transcript must be prepared by a disinterested, recognized transcriber and filed with the Board within 45 days of the date of the designation of record. For additional information contact the State Personnel Board office at (303) 894-2136.

BRIEFS ON APPEAL

The opening brief of the appellant must be filed with the Board and mailed to the appellee within twenty calendar days after the date the Certificate of Record of Hearing Proceedings is mailed to the parties by the Board. The answer brief of the appellee must be filed with the Board and mailed to the appellant within 10 calendar days after the appellee receives the appellant's opening brief. An original and 7 copies of each brief must be filed with the Board. A brief cannot exceed 10 pages in length unless the Board orders otherwise. Briefs must be double spaced and on 8 ½ inch by 11 inch paper only. Rule R-8-64, 4 CCR 801.

ORAL ARGUMENT ON APPEAL

A request for oral argument must be filed with the Board on or before the date a party's brief is due. Rule R-8-66, 4 CCR 801. Requests for oral argument are seldom granted.

CERTIFICATE OF MAILING

This is to certify that on the ____ day of November, 1999, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Nancy M. Britt
Attorney at Law
P.O. Box 767
249 "E" Street
Salida, CO 81201

and in the interagency mail, addressed as follows:

Susan J. Trout
Assistant Attorney General
Personnel and Employment Law Section
1525 Sherman Street, 5th Floor
Denver, CO 80203

_____